88-1211

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS W. HUNT and WILLIAM J. HUNT,

Petitioner,

v.

JEFFERSON SAVINGS AND LOAN ASSOCIATION,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

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QUESTIONS PRESENTED

The due process clause of the U.S. Constitution, Fourteenth Amendment, protects substantial rights but does not guarantee particular forms of procedure. States may legislate and regulate some elements of the relationship between creditors and debtors, including the provision of a reasonable and fair frame-work of rules which facilitate real estate lending practices. In Texas, the centerpiece of real estate lending is the deed of trust which names a trustee and grants to the trustee a power of private, non-judicially supervised sale.

The questions presented in this Petition are:

(1) When the petitioner's real and valuable interest is deprived by legislated procedures which provide that after constructive notice, a non-judicial foreclosure of a deed of trust lien may be implemented, followed by a creditor's suit and entry of judgment against the debtor in the amount of the deficiency remaining after sale, does this form of procedure constitute a deprivation of petitioner/debtor's Fourteenth Amendment due process rights?

(2) Has the involvement of the state, through legislating a form of procedure for non-judicial real estate foreclosures, with no statutorily protected right of redemption, a registration system for recording trustee's deeds after such non-judicial action coupled with the exposure of the debtor to civil suit, judgment and writs of execution issued by a state court, met the Fourteenth Amendment "state action" requirements?

(3) In the creditor/debtor deed of trust transaction, where non-judicial foreclosure procedures in conformance with applicable state statute are expressed, is there a knowing and intelligent waiver by the debtor of any due process protections reflected or reasonably inferred?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the preceding below are the Petitioners, DOUGLAS W. HUNT and WILLIAM J. HUNT, and the Respondent, JEFFERSON SAVINGS AND LOAN ASSOCIATION.

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No. _____

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OCTOBER TERM, 1988

DOUGLAS W. HUNT and WILLIAM J. HUNT,
Petitioners,

VS.

JEFFERSON SAVINGS & LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

The Petitioners, DOUGLAS W. HUNT and WILLIAM J. HUNT respectfully pray that a Writ of Certiorari issued to the Texas Supreme Court to review the judgment and opinion of the Texas Supreme Court for the State of Texas entered on October 26, 1988.

OPINIONS BELOW

The Order overruling Petitioners request for rehearing by the Texas Supreme Court is reprinted in the Appendix to this Petition. The Court of Appeals opinion affirming the summary judgment granted by the Trial Court is also printed in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1257.

STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Fourteenth Amendment

2. TEX. PROP. CODE §51.002:

§51.002. Sale of Real Property Under Contract Lien

(a) A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. The sale must take place in the county in which the land is located, or if the property is located in more than one county, the sale may be made in any county in which the property is located.

(b) Notice of the sale must be given at least 21 days before the date of the sale:

(1) by posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) by filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) by the holder of the debt to which the power of sale is related serving written notice of the sale by certified mail on each debtor, who, according to the records of the holder of the debt, is obligated to pay the debt.

(c) Service of a notice by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address ***.

3. TEX. PROP. CODE §11.001:

Section 11.001. Place of Recording

(a) To be effectively recorded, an instrument relating to real property must be eligible for recording and must be recorded in the county in which a part of the property is located.

4. TEX. PROP. CODE §12.001:

Section 12.001. Instruments Concerning Property

(a) An instrument concerning real or personal property may be recorded if it has been acknowledged or proved according to law.

5. TEX PROP. CODE §13.002:

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

STATEMENT OF CASE

Jefferson Savings and Loan Association ("Jefferson") brought the action that is the basis of this appeal in the 160th District Court of Dallas County, Texas, against Douglas W. Hunt and William J. Hunt ("Petitioners") based on five (5) separate promissory notes, secured by five (5) separate deeds of trust, each dated October 25, 1982, and delivered to Jefferson's predecessor in title, Congressional Mortgage Corporation of Texas, and which were subsequently assigned to Jefferson.

Each of the deeds of trust contained a specific clause, Paragraph 18, that provided specific requirements and the procedures necessary in order to accelerate the payment of the monthly payment terms of the promissory notes in the event of a default and further procedures required to exercise the option of power of sale after a proper acceleration.

Some time after making the five (5) promissory notes secured by the five (5) deeds of trust, Petitioners defaulted in the payments on the promissory notes whereupon Jefferson, the then holder of the promissory notes, by letter accelerated the total debt of each note, thereafter appointed a substitute trustee and exercised the power of sale on April 1, 1986. At such sale, Jefferson was the one and only bidder and was the purchaser of the five (5) properties at the trustee's sale.

Jefferson then brought suit seeking judgment for a deficiency created by the trustee's sale.

Petitioners filed their Answer to the Original Petition asserting as defenses that the deeds of trust did not contain provisions for automatic acceleration; did not grant the automatic right of acceleration and foreclosure without complying strictly and specifically with the provisions of the deeds of trust; that Jefferson had failed to follow the required procedure prescribed in the deed of trust to affect acceleration directing attention specifically to the requirements contained in Paragraph 18 of each of the deeds of trust and the failure to observe such requirements; alleging that the exercise of the power of

sale had been accomplished without proper acceleration of the indebtedness, and were wrongful foreclosures; that pursuant to the allegations in Jefferson's Original Petition in the 160th District Court of Dallas, County, Texas there were allegations that evidenced a single bid and sale of five (5) separate parcels of property each of which had been secured by a separate deed of trust rather than evidence of five separate trustee's sales, one for each deed of trust and upon which there was no cross collateralization; that such single sale "chilled" the bidding at the trustees sale; that the successful bidder at the trustee's sale had received "value equal to its indebtedness" by virtue of the requirement contained in the hazard insurance provisions of the deed of trust whereby the lender, Jefferson, required hazard insurance to be maintained on the properties in amounts and for such hazards as would be directed by Jefferson and for the "full value of the security"; that such requirement thereby established as between Jefferson and Petitioners, the "value of the security", such "value" being equal to the amount of the indebtedness; and further that if there existed a deficiency, Jefferson should be entitled to credit against such deficiencies of the amount of private mortgage insurance that Petitioners had been required to pay premiums upon as a loan requirement by Jefferson.

Thereafter, Petitioners filed their Counterclaim and Cross-Claim against Jefferson alleging wrongful foreclosure occasioned by the trustee's sales based upon flawed exercise of the acceleration as required by Paragraph 18 of the deeds of trust; damages for waste committed by Jefferson, and damages of loss of the value in the separate properties together with other damages.

Jefferson filed its Motion for Summary Judgment alleging no genuine issues as to any material facts, supporting its Motion by an Affidavit together with exhibits thereto attached.

Petitioners filed their response to Jefferson's Motion for Summary Judgment attaching as exhibits thereto its Amended Answer to Plaintiff's Original Petition with its exhibits; and the

affidavits in support of Petitioners Answer to Jefferson's Motion for Summary Judgment.

The Trial Court entered judgment in favor of Jefferson from which Appellants appealed. The Court of Appeals affirmed the Trial Court's Judgment. The Texas Supreme Court refused to grant a writ of error, stating that no reversable error was found in the record. Petitioners requested a rehearing by the Texas Supreme Court, which motion was denied.

Throughout the summary trial and appeal, Petitioners repeatedly objected to the inadequacy of notice, the manner of the trustee's sale and the inadequacy of the sale price received by the trustee. These are the same due process arguments advanced in this petition although U.S. constitutional phraseology may not have been expressly included by Petitioners in their arguments before the Texas Trial Court, Court of Appeals and the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

THE DUE PROCESS REQUIREMENTS OF MEANINGFUL NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE TIME OF SEIZURE AND SALE OF PROPERTY WAS DENIED PETITIONERS

A borrower, securing a loan with a deed of trust lien on real property, under the Texas scheme, has a real and present interest — that of title to the subject real estate. The deed of trust does not deprive the borrower of title. The interest of the debtor, consequently, is protected by the Fourteenth Amendment.

The creditor, too, has an interest in the property subject to the deed of trust lien. However, that interest is not normally at risk of waste, and real property generally is not movable from the jurisdiction of local authorities as is the case when personal property is involved. Where movable property is concerned,

competing interests and risks must be recognized. These competing interests have been recognized and discussed in *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 94 Sup. Ct. 1895, 40 L Ed 2d 406 (1974). In *Mitchell,* the creditor's interest was in household goods in the hands of the debtor/possessor. The Louisiana statute consequently was viewed by the Court as addressed to the risk of deterioration, waste or removal. This Court, in *Mitchell,* expressed the view that the Louisiana statutory procedure reached a constitutional accommodation of the conflicting interests of the creditor and debtor as regards movable property. The creditor's interest in this case, is not exposed to the same kind or degree of risk, since the property interest is in real estate.

The TEX. PROP. CODE §51.002(a) and predecessor legislation, provides no judicial supervision of the trustee, acting for the lien holding creditor in regard to the power of sale. The notice, provisions mandate only constructive notice. TEX. PROP. CODE §51.002(b). Foreclosure, sale and disposition of sale proceeds are all carried out by the trustee named in the deed of trust. No statutory redemption rights are provided. The County Clerk of the County where the property is situated records the trustee's deed. TEX. PROP. CODE §11.001 and §12.001. The Texas statutory scheme does not afford the debtor any assurance of judicial supervision "all along the way" or any right of redemption. Texas law does afford a debtor, dispossessed of title resulting from a foreclosure and sale, a cause of action for wrongful foreclosure. But, this is not due process protection of an existing property interest. It is merely the substitution of a new property interest in exchange for the property interest seized and sold. Perhaps, it is an interest of significantly less value to the debtor than the interest taken.

The judicial action which has come up through Texas appeals process on which this Petition is founded is not one in the nature of a supervision of the conduct of the seizure, the foreclosure, the sale, or, disposition of sale proceeds. Rather, it

is a suit instituted by the creditor for civil judgment against the debtor arising out of a deficiency remaining due after applying the net sale proceeds from the non-judicial foreclosure sale to the principal and interest due under the debtor's note to the Respondent. There is no judicial supervision and protection of due process afforded to the debtor and his interest during the non-judicial taking, foreclosing, selling and disbursal of sale proceeds in this kind of action. The seizure and sale at the time this suit was instituted, had already been completed.

The Court decision in *Mitchell* addresses facts and the balancing of interest not present in this case. Appropriate to this case are the principles expressed in *Fuentes v. Shevin,* 407 U.S. 67, 92 Sup. Ct. 1983, 32 L Ed 2d 556 (1972). The Court, in *Fuentes* said this:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." 407 U.S. at 81.

Consistent with this statement in *Mitchell,* it was found that the Louisiana sequestration statute, under examination in that case, in fact, provided judicial control of the process from the beginning to the end. See *Michell,* 416 U.S. at 616.

The Fifth Circuit of the United States Court of Appeals in *Barrera v. Security Building and Investment Corporation,* 519 F 2d 1166 (1975) examined the Texas statute establishing the non-judicial foreclosure and sale of real estate in a suit brought by the debtor who had lost their residence in a non-judicial foreclosure sale conducted pursuant to a deed of trust. In *Barrera,* the action was founded on 42 U.S.C. §1983, for damages. The second shoe had not been dropped in *Barrera* as is the case brought by the Petitioners. In *Barrera,* the creditor, after non-judicial foreclosure, sale, conveyance and disbursal of sale proceeds, engaged in no further action judicial or non-judicial. No attempt was made by the creditor to sue for and establish a judgment for a deficiency. The Fifth Circuit, consequently, addressed mainly the questions of whether or not

the fact of statutory regulation by a state alone is sufficient to implicate the state for Fourteenth Amendment state action purposes. *Barrera,* at 1170-71. The Fifth Circuit also overlooked other state actions which normally will follow the trustee's sale.

The approach of the Fifth Circuit in *Barrera* actually turned the Fourteenth Amendment upside down, rendering "state action" analysis the primary focus and the due process protection a minor theme. The District Court in *Turner vs. Blackburn,* 389. F. Supp. 1250 (W.D. North Carolina, 1975), found not only "state action" but also the failure of the North Carolina statute to provide adequate notice, coupled with an opportunity to be heard, appropriate to the nature of the case. *Turner* at 1258-59.

STATE ACTION IS PRESENT

Barrera stands only for the proposition that the Texas statutory scheme, without more, is insufficient to constitute state action. In *Lugar v. Edmondson Oil Company, Inc. and Ronald L. Barbour,* 457 U.S. 922, 102 Sup. Ct. 2744, 73 L Ed 2d 482 (1982) state action is found where state officers act jointly with a private creditor in securing the property in dispute. The County Clerks in Texas, where transfers of real estate are recorded, certainly act jointly with the trustee, who is acting for the benefit of the secured creditor in selling and transferring title of real property after a sale made pursuant to the deed of trust. Tex. Prop. Code §§11.001, 12.001 and 13.002. The *Lugar* test for the presence of "state action" controls. Additionally, the use of court proceedings in *Dahl v. Akin,* 630 F. 2d 277 (1980), a "liberty" case, was found to constitute "state action" by the Fifth Circuit. *Dahl,* at 280-81. On the other hand, in *Girard v. 94th Street and 5th Avenue Corporation,* 530 F.2d 66 (2nd Cir. 1976), the Second Circuit held the enforcement by a court of a lease provision requiring the consent of the board of directors of the lessor to a lease assignment not to constitute state action,

discussing, at length, this Court's decision in *Shelley v. Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836, 92 L Ed 1161 (1948). The court action, however, in *Girard*, was in the nature of declaratory relief. The Petitioners here have not only seen the creditor avail itself of the Texas courts, but also has felt the real and present weight of governmental authority when the Texas Court entered a deficiency judgment against them.

State action is present. Texas legislation establishing the non-judicial foreclosure process, providing only the minimum notice protection to the debtor — that is constructive notice — and the land registration offices and officers of the State for purposes of recording the trustee's deed is enough for "state action" analysis. Additionally, the statutory scheme deprives the debtor of the protection of redemption yet reserves to the creditor, the offices of the court for purposes of suing out and taking judgment against the debtor for any deficiency, and the availability of such writs and processes as are available to judgment creditors generally.

FINDING A WAIVER OF DUE PROCESS STRAINS THE NATURE OF THE TRANSACTION AND IS UNFAIRLY ONE-SIDED UNLESS WAIVER BY THE CREDITOR IS ALSO FOUND

It is not disputed that parties may waive due process rights. It is often said that such waiver must be an informed waiver and made intelligently. Various forms of contract may present facts demonstrating the waiver of due process rights but the facts of each case controls. *D. H. Overmyer Co. v. Fick Co.*, 405 U.S., 174, 92 Sup. Ct. 775, 31 L Ed. 2d 124 (1972); *Swarb v. Lennox*, 405 U.S. 191, 92 Sup. Ct. 767, 31 L Ed. 2d 138 (1972). The deed of trust contract between the creditor and the debtor in this case, however, does not have the waiver of due process rights as a main or even subsidiary purpose. The deed of trust transaction has as its main purpose the granting to the creditor of the right of non-judicial foreclosure, in accordance with applicable Texas statutes, and the reduction of such statutorily governed contractual provisions into a writing to be filed as part

of the deed records pertaining to the subject real estate. The intervention of the state in legislating a statutory scheme for the non-judicial foreclosure leaves no room for any implication of the intention of the debtor, to knowingly and intelligently waive due process rights. *United States v. Wynn*, 528 F.2d 1048 (5th Cir. 1976) and like decisions misconstrue the actual transactions which occur when the deed of trust is signed.

The often expressed argument of waiver, moreover, is one-sided and, therefore, unfair. If waiver issues arise in this relm of examination of due process rights, then to remain within the bounds of reason, it should be considered as a dual waiver, or exchange of waivers. The exchange of waivers would be the debtor's waiver of such due process rights as would otherwise prohibit state action in support of non-judicial foreclosures. In exchange for the debtor's waiver, the deed of trust would be interpreted to include creditor's waiver of the right to enter into court, after a non-judicial foreclosure, to seek judgment for deficiency and obtain the writs of the court in enforcement of the judgment.

In Texas, creditors contemplating foreclosure know at the time the foreclosure proceeding is instituted whether or not there is a probability of a deficiency. This knowledge flows from the creditor's concern with the holding in *Durrett vs. Washington National Insurance Company*, 621 F.2d 201 (5th Cir. 1980). Nearly every foreclosure is undertaken with one eye on the *Durrett* rule regarding foreclosure bidding and the other on the prospect of the debtor seeking the protection of the Bankruptcy Code to forestall or delay the foreclosure sale. Updated appraisals are frequently secured. Consequently, it does not impose any burden upon creditors not already imposed on them to inform themselves of whether or not there is a prospect of a deficiency.

If the prospect of deficiency exists and the creditor desires not to waive it's right to enter into court and avail itself of the judicial process to obtain judgment and writs of enforcement to recover the deficiency, then such creditor should enter the court

at once seeking a judicially supervised foreclosure process, thereby assuring the debtor actual notice and opportunities to be heard at all relevant times.

CONCLUSION

JEFFERSON SAVINGS AND LOAN ASSOCIATION holds a title to the real property seized and sold out from under the Petitioners as well as a Texas Judgment against the Petitioners. The transfer, the sale resulting in a deficiency, the judgment on the deficiency all bear a common stain. They comprise benefits acquired in a seizure and sale which rode roughly over Petitioner's due process rights. The State of Texas acted all along the way, by legislating the non-judicial scheme, by registering trustee's deeds and by opening the doors of Texas courts to JEFFERSON for its pursuit of a deficiency judgment. The Fourteenth Amendment reaches all this joint action of the legislature, the trustee, Texas registration clerks, and the trial court which combined to bring about the result. Due process requires all such actions be set aside.

Respectfully submitted,

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APPENDIX

1. The Order of the Texas Supreme Court

IN THE
SUPREME COURT OF TEXAS

No. C-7758.

DOUGLAS W. HUNT and
WILLIAM J. HUNT

vs.

JEFFERSON SAVINGS & LOAN
ASSOCIATION

From DALLAS COUNTY
Fifth District

September 14, 1988

Application of petitioners for writ of error to the Court of Appeals for the Fifth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and *hereby is, denied.*

It is further ordered that applicants, Douglas W. Hunt and William J. Hunt, pay all costs incurred on this application.

No. C-7758.

DOUGLAS W HUNT and
WILLIAM J. HUNT

vs.

From DALLAS COUNTY,
Fifth District

JEFFERSON SAVINGS & LOAN
LOAN ASSOCIATION

October 26, 1988

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the

27th day of October, 1988.

Mary M. Wakefield, Clerk

By _____

COURTLAND CROCKER
Deputy Clerk

2. The Judgment of the Court of Appeals

IN THE

COURT OF APPEALS

Fifth District of Texas
at Dallas

DOUGLAS W. HUNT and
WILLIAM J. HUNT

Appellants,

v.

JEFFERSON SAVINGS & LOAN
ASSOCIATION,

Appellee.

No. 05-87-00749-CV

JUDGMENT

In accordance with this Court's opinion of May 16, 1988, the judgment of this Court is as follows: The judgment of the trial court is AFFIRMED. It is ORDERED that appellee Jefferson Savings & Loan Association recover its costs of this appeal from appellants Doughas W. Hunt and William J. Hunt and from the cash deposit in lieu of appeal bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Charles Marcus, attorney for Douglas W. Hunt.

May 16, 1988.

ED KINKEADE
Justice

3. The opinion of the Texas Court of Appeals

IN THE

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-87-00749-CV

DOUGLAS W. HUNT and WILLIAM J. HUNT, *Appellants,* v. JEFFERSON SAVINGS & LOAN ASSOCIATION, *Appellee.*	FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES HOWELL, LAGARDE AND KINKEADE
OPINION BY JUSTICE KINKEADE

May 16, 1988

Appellants, Douglas W. and William J. Hunt (Hunt) appeal a summary judgment rendered for appellee, Jefferson Savings and Loan Association (Jefferson) for a $184,498.77 deficiency created by a trustee's sale of five properties. The suit is based on five promissory notes, secured by deeds of trust, executed by Douglas W. Hunt and William J. Hunt (as co-maker) and delivered to Jefferson's predecessor in interest, Congressional Mortgage Corporation of Texas. After default by Hunt on payment of each note, Jefferson foreclosed on the properties and sued Hunt for deficiencies on each note, plus attorneys fees, interest, and costs. Hunt counterclaimed, seeking damages for wrongful foreclosure plus attorneys fees. The trial court granted summary judgment in favor of Jefferson denying Hunt's counterclaim.

In four points of error, Hunt claims the trial court erred in: 1) granting Jefferson's motion for summary judgment because the note acceleration and the trustee's foreclosure sale was improper; 2) granting Jefferson's motion for summary judgment because a fact question exists as to irregularities at the trustee's sale; 3) failing to find that a fact question exists as to whether the lender received property "equal to the value of its indebtedness;" and 4) failing to find that a fact question exists as to whether Hunt is entitled to a credit for the amount of insurance proceeds Jefferson received from the Private Mortgage Insurance policy. Jefferson, in its sole cross-point, requests damages for delay. We overrule all points of error and the cross-point and affirm the judgment.

On October 25, 1982, Hunt borrowed $263,000 from Congressional Mortgage Corporation of Texas for the purchase of five condominiums. Hunt executed five promissory notes, agreeing to make installment payments and other obligations under the notes until all payments were made. Douglas Hunt executed and delivered five deeds of trust on the properties as collateral to secure payment of the notes. On October 29, 1982, Congressional transferred the notes and all interest in the properties to Jefferson. Hunt subsequently defaulted under the terms of the notes and deeds of trust.

On January 8, 1986, Jefferson sent Hunt notice that unless payment was made, it intended to exercise its options under the deeds of trust and accelerate the notes. This would result in foreclosure of the properties. The notice also stated that after acceleration, Hunt had the option to reinstate the loan and/or bring suit alleging any defenses. On March 10, 1986, Jefferson sent Hunt notice that acceleration had taken place, all unpaid payments were declared due and payable and that a substitute trustee's sale would take place on April 1, 1986. On April 1, 1986, the trustee sold the properties for $125,280 resulting in a deficiency of $182,498.77. Jefferson filed suit for the deficiency.

In point of error one, Hunt claims the summary judgment was improper because Jefferson failed to follow requirements of the deeds of trust to accelerate and all foreclosures were wrongful. We disagree. When the holder of a promissory note has the option to accelerate maturity of the note upon the maker's default, equity demands notice be given of the intent to exercise the option. *Brown v. Hewitt,* 143 S.W.2d 223, 224 (Tex. Civ. App. — Galveston 1940, writ ref'd). Thus, absent waiver, the holder of a delinquent installment note must present the note and demand payment of the past-due installments prior to exercising his right to accelerate. *Allen Sales and Servicenter, Inc. v. Ryan,* 525 S.W.2d 863, 866 (Tex. 1975). In the case of a mortgage secured by a deed of trust, such notice must afford an opportunity to cure the default and bring home to the mortgagor that failure to cure will result in acceleration of the note and foreclosure under the power of sale. *Lockwood v. Lisby,* 476 S.W.2d 871, 873 (Tex. Civ. App. — Fort Worth 1972, writ ref'd n.r.e.). If, after such notice, the mortgagor fails to remedy the breach, then the mortgagee is authorized to accelerate maturity and begin foreclosure proceedings under the deed of trust. *See Natali v. Withaus,* 134 Tex. 513, 135 S.W.2d 969, 977 (1940).

Hunt contends Jefferson did not properly accelerate the notes because notice was not sent to Hunt. We disagree. The initial notice of January 8, 1986, set forth the breach — the non-payment; the action required to cure the breach-payment of $38,351.98; the deadline to cure — February 10, 1986; and the result of failure to cure — acceleration.

Hunt failed to cure the default and on March 10, 1986, Jefferson sent a second notice declaring all unpaid amounts due and payable and that the properties would be foreclosed on April 1, 1986. Summary judgment was properly granted since all notices required by law and by the deeds of trust were met. We overrule Hunt's first point of error.

Hunt, in point of error two, claims the trial court erred in failing to find that a question of fact exists as to whether or not there was substantial irregularity at the substitute trustee's sale. Hunt contends that a single bid and single sale occurred for all five properties, chilling the bidding and resulting in an inadequate sale price.

Mere inadequacy of consideration is not grounds for setting aside a trustee's sale, but evidence of an irregularity that causes or contributes to a grossly inadequate price is. *American Savings v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975). Evidence showing that a better price would have resulted if the sale was conducted in a different manner is required. *Ballah v. First National Bank of Hereford*, 474 S.W.2d 785, 788 (Tex. Civ. App. — Eastland 1971, writ ref'd n.r.e.). Hunt failed to present any evidence to raise a fact question as to whether the consideration was inadequate or any irregularity occurred. Jefferson attached an exhibit to its motion for summary judgment setting forth in detail the amounts that were bid on each property. This evidence along with the fact that the properties were separately posted for sale and that separate substitute trustee deeds were executed, supports the court's findings that a proper sale occurred. Hunt's second point of error is overruled.

In point of error three, Hunt claims the trial court erred in failing to find that pursuant to the lender's imposed hazard insurance requirements, a fact question existed as to whether the lender as the successful purchaser at the substitute trustee's sale received property "equal to the value of its indebtedness." We disagree.

Hunt contends that they were required to maintain hazard insurance on each property equal to the loan values and Jefferson is bound by those values at foreclosure. No authority is cited by Hunt for this proposition. Jefferson asserts that the insurance requirement is merely evidence of the amount of risk, if any, the lender chooses to bear in the event the property is destroyed. We agree. We overrule Hunt's third point of error.

Hunt, in point of error four, claims the trial court erred in failing to find that a fact question exists as to whether Hunt is entitled to a credit against the deficiency for the amount of monies Jefferson received from the private mortgage insurance policy that pays in the event of default on the notes. Hunt contends they should be entitled to a credit for twenty to twenty-five percent of the amount of the note because Jefferson required Hunt to pay the premiums. No contract existed giving Hunt a right to an offset for private mortgage insurance coverage, nor is there a requirement at law for an offset. Hunt's position is outside the contractual agreements between the parties and wholly unsupported by the law. Hunt fails to present any evidence to support their position, therefore, the summary judgment was proper. Hence, we overrule Hunt's final point of error.

In its sole cross-point, Jefferson asserts it should be awarded damages because Hunt brought this appeal merely for delay and without sufficient cause. Jefferson alleges that this appeal is wholly without merit in that Hunt's points of error are either not supported by the law or they are completely unsupported by evidence. We disagree.

Rule 84 of the Texas Rules of Appellate Procedure states:

> In civil cases where the court of appeals shall determine that an appellate has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount (not to exceed ten percent) of the amount of damages awarded to such appellee as damages against such appellant. . . .

The court must look at the case from the point of view of the advocate and determine whether he has reasonable grounds to believe the case would be reversed. *See Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex. App. — Dallas 1985, writ ref'd n.r.e.).

While we do not hold that Hunt's agruments are strong enough for reversal, we refuse to hold that they are so unreasonable that Jefferson is entitled to damages. We overrule this cross-point and affirm the judgment of the trial court.

ED KINKEADE
Justice